

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RICHARD GIBRICH, )  
 ) CASE NO. C09-1617-MJP  
Plaintiff, )  
 )  
v. ) REPORT AND RECOMMENDATION  
 ) RE: SOCIAL SECURITY DISABILITY  
MICHAEL J. ASTRUE, Commissioner ) APPEAL  
of Social Security, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Plaintiff Richard Gibrich proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REMANDED for further administrative proceedings.

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**FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1954.<sup>1</sup> He completed one year of college. (AR 96.) Plaintiff previously worked as a dishwasher/kitchen helper and forklift operator. (AR 23, 92.) Plaintiff filed an application for SSI in June 2004. (AR 84-86.) He alleged disability beginning May 2001 due to back pain. (AR 84, 91.) His application was denied at the initial level and on reconsideration, and he timely requested a hearing.

On November 17, 2006, ALJ Verrell Dethloff held a hearing, taking testimony from plaintiff. (AR 416-43.) On January 29, 2007, the ALJ issued a decision finding plaintiff not disabled. (AR 32-43.)

Plaintiff timely appealed. The Appeals Council, on October 30, 2007, remanded plaintiff's claim to the ALJ. (AR 73-74.) The ALJ held a supplemental hearing on January 2008, taking testimony from plaintiff and vocational expert Merrill Cohen. (AR 444-55.) The ALJ again, on June 20, 2008, issued a decision finding plaintiff not disabled. (AR 16-25.) With some modifications, he incorporated his previous discussion of exhibits and other evidence, analysis of exhibits, and the conclusions reached. (AR 18.)

The Appeals Council denied plaintiff's request for review on October 23, 2009 (AR 6-9), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

**JURISDICTION**

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

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<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

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02 **DISCUSSION**

03 The Commissioner follows a five-step sequential evaluation process for determining  
04 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
05 must be determined whether the claimant is gainfully employed. The ALJ found that plaintiff  
06 had not engaged in substantial gainful activity (SGA) since June 24, 2004, the date he  
07 protectively filed his application for SSI and the earliest date relevant to his claim. He  
08 concluded that plaintiff's part-time work at a non-profit thrift store did not rise to the level of  
09 SGA.

10 At step two, it must be determined whether a claimant suffers from a severe impairment.  
11 The ALJ found plaintiff's lumbar and cervical degenerative disc disease, thoracic osteoarthritis,  
12 dysthymia, and obesity severe.

13 Step three asks whether a claimant's impairments meet or equal a listed impairment.  
14 The ALJ concluded plaintiff did not have an impairment or combination of impairments that  
15 met or medically equaled a listing.

16 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
17 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
18 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to  
19 perform light work, meaning he could stand and/or walk for six hours in an eight hour day, sit  
20 for six hours in an eight hour day, and do unlimited pushing and pulling. The ALJ found  
21 plaintiff could occasionally climb, balance, stoop, kneel, crouch, crawl, and bend, that he could  
22 perform no more than simple and complex tasks, and that he should have no more than

01 superficial contact with the public and routine supervision. With this RFC, the ALJ found  
02 plaintiff unable to perform any past relevant work.

03 If a claimant demonstrates an inability to perform past relevant work, the burden shifts  
04 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make  
05 an adjustment to work that exists in significant levels in the national economy. With the  
06 assistance of the vocational expert, the ALJ found plaintiff able to perform other jobs, such as  
07 work as a small products assembler and outside deliverer.

08 This Court's review of the ALJ's decision is limited to whether the decision is in  
09 accordance with the law and the findings supported by substantial evidence in the record as a  
10 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
11 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
12 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
13 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
14 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
15 F.3d 947, 954 (9th Cir. 2002).

16 Plaintiff argues that the ALJ erred in ruling that his RFC assessment was supported by  
17 "mild" objective findings, in consideration of the issues of following prescribed treatment and  
18 obesity, in evaluating the opinions of a treating physician, and in rendering the credibility  
19 decision. He requests remand for an award of benefits or, in the alternative, for further  
20 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by  
21 substantial evidence and should be affirmed.

22 The Court has discretion to remand for further proceedings or to award benefits. *See*

01 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may direct an award of  
02 benefits where “the record has been fully developed and further administrative proceedings  
03 would serve no useful purpose.” *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir.  
04 2002).

05 Such a circumstance arises when: (1) the ALJ has failed to provide legally  
06 sufficient reasons for rejecting the claimant’s evidence; (2) there are no  
07 outstanding issues that must be resolved before a determination of disability can  
be made; and (3) it is clear from the record that the ALJ would be required to  
find the claimant disabled if he considered the claimant’s evidence.

08 *Id.* at 1076-77. For the reasons described below, the Court concludes that this matter should be  
09 remanded for further administrative proceedings.

#### 10 Objective Medical Evidence

11 Objective medical evidence refers to “signs” and laboratory findings. 20 C.F.R. §§  
12 404.1512(b)(1), 416.912(b)(1). “Signs are anatomical, physiological, or psychological  
13 abnormalities which can be observed, apart from your statements (symptoms). Signs must be  
14 shown by medically acceptable clinical diagnostic techniques.” §§ 404.1528(b), 416.928(b).

15 The ALJ in this case stated that the RFC assessment was “supported by the mild  
16 objective findings of record, which do not support the degree of disability” alleged. (AR 22.)  
17 Plaintiff contends the ALJ mischaracterized the record given the plethora of objective findings  
18 greater than “mild” severity. He points to June 2003 x-rays of the cervical spine and  
19 lumbosacral spine showing “moderate to marked” degenerative changes (AR 213-14), and  
20 November 2003 MRI studies showing “severe” and “moderate” disc space narrowing on the  
21 lumbar spine and “moderate” bilateral facet osteoarthritis on the thoracic spine (AR 205-06).

22 Plaintiff also points to his objective weight as reflecting more than mild signs.

01 Pursuant to Social Security Ruling (SSR) 02-1p, “[o]besity is a complex, chronic disease  
02 characterized by excessive accumulation of body fat[]” and is classified in adults according to  
03 Body Mass Index (BMI), a height/weight ratio. Plaintiff points to the record as reflecting that  
04 he had a BMI well over 40, denoting “extreme obesity,” at all relevant times. (*See* Dkt. 12 at  
05 6-7 (collecting data as to weight and BMI from record).) *See also* SSR 02-1p (“level III,  
06 termed ‘extreme’ obesity and representing the greatest risk for developing obesity-related  
07 impairments, includes BMIs greater than or equal to 40.”) He avers, therefore, that substantial  
08 evidence does not support the ALJ’s conclusion that “mild” objective findings support the RFC  
09 assessment.

10 The Commissioner observes that the ALJ acknowledged and summarized the 2003  
11 x-rays and MRI studies highlighted here by plaintiff (AR 20, 36) and used those findings in  
12 limiting plaintiff to light work (AR 36). Among other arguments, he asserts that, for the ALJ,  
13 the moderate and marked findings were offset by findings termed mild, including, but not  
14 limited to, a number of findings from the November 2003 MRI studies. (AR 36.) The  
15 Commissioner also notes the ALJ’s recognition of plaintiff’s obesity and BMI, and his  
16 formulation of associated exertional and postural limitations. (*See, e.g.*, AR 20, 23.) He  
17 points to the recognition in SSR 02-1p that BMI “levels describe the extent of obesity, but they  
18 do not correlate with any specific degree of functional loss.” The Commissioner also points to  
19 the ALJ’s consideration of treating physician Dr. Sam Eggertsen’s opinions as related to  
20 obesity, including, *inter alia*, that physician’s failure to indicate any specific functional  
21 limitations due to obesity and his consistent directive that plaintiff should engage in aerobic  
22 exercise. (AR 21.)

01 The ALJ did describe the 2003 objective findings in his earlier decision. (AR 36.) He  
02 recited the moderate and marked findings on the June 2003 x-rays ordered by Dr. Thomas Chin,  
03 noted that Dr. Eggertsen ordered further studies, and described the November 2003 results as  
04 follows: “Lumbar spine x-rays showed degenerative disc disease at L4-5 and L5-S1 with no  
05 focal disc herniation or significant appearing central stenosis. Thoracic spine x-rays showed  
06 degenerative facet osteoarthritis at T2-T3 with no cord impingement and degenerative disc  
07 disease in the mid and lower cervical spine also without impingement.” (AR 36.) The ALJ  
08 gave weight to the November 2003 objective findings and stated that “[c]orresponding limits  
09 [were] reflected in claimant’s restriction to light duty work.” (*Id.*) The ALJ mentioned that  
10 Dr. Eggertsen later “noted that claimant had a neural surgery consultation pending but that his  
11 review of claimant’s MRI showed no surgically amenable lesion[,]” as also found by a  
12 subsequent reviewing physician. (*Id.*) He gave weight to the fact that treating and reviewing  
13 physicians “felt that surgery was not indicated for claimant.” (AR 37.)

14 Additionally, among other findings, the ALJ described a June 2003 examination by Dr.  
15 Chin finding plaintiff, *inter alia*, “was tender to palpation of the lower cervical spine and right  
16 lower paracervical areas[,]” and had “normal muscle strength” and gait. (AR 35.) He gave  
17 little weight to Dr. Chin’s opinion limiting plaintiff to sedentary work, and a similar opinion  
18 from Dr. Eggertsen in May 2004, given the lack of supporting objective evidence. (*Id.*) The  
19 ALJ also noted that, in January 2004, Dr. Eggertsen’s examination of plaintiff’s back “showed  
20 no tenderness to palpation[.]” (AR 36; emphasis in original), that an August 2005 examination  
21 revealed “diffuse tenderness over the paraspinous muscles of the lower thoracic and upper  
22 lumbar back” but “no objective findings of limits[.]” (AR 39), and opined that, while two later

01 forms completed by Dr. Eggertsen found plaintiff could perform sedentary work, these  
02 opinions were not supported by his treatment notes or the objective findings of record (AR  
03 38-39). The ALJ, as in the later decision, ultimately described the record as reflecting “mild  
04 objective findings[.]” (AR 41.) Additionally, in the later decision, the ALJ cited the portions  
05 of the record reflecting the 2003 objective findings in stating that plaintiff “has a history of  
06 cervical and low back degenerative changes, and obesity[.]” while adding: “There was no  
07 finding of neural compromise, however[.]” (AR 20; internal citations to record omitted.)

08       The ALJ also, as noted by the Commissioner, considered plaintiff’s obesity and BMI  
09 and assessed associated limitations. (AR 20-23.) He described Dr. Eggertsen’s treatment in  
10 relation to that condition in detail, including frequent admonitions to lose weight and exercise,  
11 the lack of specific functional limitations assessed, and the relative lack of attention paid to this  
12 condition. (AR 21 (“Overall, in his treatment notes Dr. Eggertsen mentioned obesity but did  
13 not direct much attention to it other than advising the claimant to exercise more, and lose  
14 weight.”)) The ALJ thereafter found a reviewing physician’s opinion that plaintiff could do  
15 light work with occasional climbing, balancing, stooping, kneeling, crouching, and crawling  
16 consistent with the effects of his impairments, including obesity. (AR 22.) He also, as  
17 discussed further below, considered plaintiff’s failure to follow recommendations on diet and  
18 exercise in assessing plaintiff’s credibility. (AR 23.)

19       In his reply, plaintiff argues, *inter alia*, that the absence of disc herniation requiring  
20 back surgery is a red herring. He asserts that, in fact, his back impairment is degenerative disc  
21 disease, not a herniated disc.

22       Plaintiff’s reliance on his BMI levels is unavailing. As noted by the Commissioner,



01 BMI “levels describe the extent of obesity, but they do not correlate with any specific degree of  
02 functional loss.” SSR 02-1p. In this case, the ALJ appropriately found plaintiff’s obesity  
03 severe and assessed associated limitations. (AR 19-20, 23.) Nor does plaintiff successfully  
04 discredit the ALJ’s consideration of the absence of a surgery indication. He does not, for  
05 example, point to record evidence supporting the contention that the lack of a surgical  
06 recommendation is not medically relevant in considering the severity of the condition of  
07 degenerative disc disease.

08 The remaining issue, therefore, is whether the ALJ committed reversible error in  
09 relation to the results of the 2003 x-rays and MRI studies. As averred by the Commissioner,  
10 “[t]he ALJ is responsible for resolving conflicts in the medical record.” *Carmickle v. Comm’r*  
11 *of SSA*, 533 F.3d 1155, 1164 (9th Cir. 2008) (citing *Benton v. Barnhart*, 331 F.3d 1030, 1040  
12 (9th Cir. 2003)). The ALJ in this case did not ignore the results of the x-rays and MRI studies.  
13 He read the record, overall, as revealing generally mild objective findings.

14 Standing alone, it is questionable whether the ALJ’s description of the objective  
15 evidence demonstrates reversible error. However, ideally, the ALJ would have expanded on  
16 his statement as to objective findings or otherwise distinguished the 2003 x-ray and MRI study  
17 findings. (See AR 22.) Because the Court finds remand in this matter appropriate for the  
18 reasons described below, it also finds that the ALJ should be directed to clarify his statement as  
19 to objective findings. In particular, the ALJ must explain the objective findings he  
20 characterizes as mild and directly address the 2003 x-ray and MRI study findings.

21 Following Prescribed Treatment

22 Plaintiff argues that the ALJ erroneously applied the failure-to-follow-prescribed-

01 treatment regulation, 20 C.F.R. §§ 404.1530, 416.930. That regulation provides that a  
02 claimant must follow prescribed treatment if that treatment can restore the claimant's ability to  
03 work. *Id.* However, an adjudicator may consider the failure to follow prescribed treatment in  
04 an obesity case only where a plaintiff has been found disabled due to obesity, or obesity and a  
05 combination of other impairments. SSR 02-1p. Here, plaintiff argues, the ALJ improperly  
06 relied on §§ 404.1530 and 416.930 in finding that "a remediable impairment cannot provide the  
07 predicate for a finding of disability[]" (AR 23), given that he never found, before taking into  
08 account any failure to follow prescribed treatment, that plaintiff would be disabled. He asserts  
09 further error in relation to SSR 02-1p and §§ 404.1530 and 416.930, in that the treatment at  
10 issue must be prescribed treatment, not simply recommended, in that there must be clear  
11 evidence that treatment would be successful, and that a claimant may have a "good reason" for  
12 not following prescribed treatment.

13       The Commissioner concedes error in the application of the failure-to-follow-prescribed-  
14 treatment regulation, but maintains that the error was harmless given the many other reasons  
15 offered for the ALJ's conclusion. *See Carmickle*, 533 F.3d at 1162-63 (error may be deemed  
16 harmless where there remains the support of substantial evidence through other valid reasons to  
17 support the ALJ's conclusion). He notes that the ALJ's discussion of this issue appeared in the  
18 final paragraph of the RFC assessment, and was prefaced by the phrase: "In addition I note . .  
19 . ." (AR 23.)

20       This error was harmless. As argued by the Commissioner, the ALJ discussed this issue  
21 as one of many reasons supporting his RFC assessment. (*See* AR 19-23.) Nonetheless, on  
22 remand, the ALJ should, if necessary, conduct a legally sufficient analysis as to this issue.

01 ///

02 Credibility

03 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to  
04 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001).  
05 *See also Thomas*, 278 F.3d at 958-59. In finding a social security claimant's testimony  
06 unreliable, an ALJ must render a credibility determination with sufficiently specific findings,  
07 supported by substantial evidence. "General findings are insufficient; rather, the ALJ must  
08 identify what testimony is not credible and what evidence undermines the claimant's  
09 complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "We require the ALJ to  
10 build an accurate and logical bridge from the evidence to her conclusions so that we may afford  
11 the claimant meaningful review of the SSA's ultimate findings." *Blakes v. Barnhart*, 331 F.3d  
12 565, 569 (7th Cir. 2003). "In weighing a claimant's credibility, the ALJ may consider his  
13 reputation for truthfulness, inconsistencies either in his testimony or between his testimony and  
14 his conduct, his daily activities, his work record, and testimony from physicians and third  
15 parties concerning the nature, severity, and effect of the symptoms of which he complains."  
16 *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

17 The ALJ in this case found plaintiff's statements concerning the intensity, persistence,  
18 and limiting effects of his symptoms not credible to the extent inconsistent with the RFC  
19 assessment. (AR 20.) He first reviewed the medical record and concluded that it showed  
20 plaintiff had "some symptoms and limitations, but not to the point of disability." (AR 20-22.)  
21 The ALJ then described other evidence supporting his conclusion:

22 In July 2004 he took a 3-week visit by car to California, which included a

01 Disneyland visit. He also reported that he was able to care for pets and his son,  
02 do woodworking, shopping, exercising, and he managed other tasks as  
discussed in the prior decision and incorporated by reference. These activities  
are consistent with the residual functional capacity determined in this matter.

03  
04 In July 2004, the claimant reported very limited daily activities, including  
difficulty with personal care and limited walking, standing, lifting, sitting, and  
even reclining. He claimed he was unable to travel much. This was written  
05 around the time that claimant went to Disneyland, where he must have done  
activities highly inconsistent with his claims in this statement, including sitting  
06 in the car for travel, walking around the park, and riding rides.

07 A vacation and a disability are not mutually exclusive, of course, although the  
claimant's California trip tends to suggest that the claimant's alleged limitations  
08 have been overstated. Although the claimant described daily activities that  
were very limited, other factors weigh against considering these allegations to  
09 be strong evidence in favor of finding the claimant disabled. First, allegedly  
limited daily activities cannot be objectively verified with any reasonable degree  
10 of certainty. Secondly, even if his daily activities were as limited as alleged, it  
is difficult to attribute the degree of limitation to the claimant's medical  
11 condition, as opposed to other reasons, in view of the medical evidence and  
other factors discussed in this decision. Overall, the claimant's reportedly  
12 limited daily activities are considered to be outweighed by other more  
persuasive evidence in the record.

13  
14 As noted before, the claimant takes a regimen of medication that is consistent  
with impairments and functional limitations. But the record shows that his  
treatment is effective in addressing his symptoms.

15  
16 In sum, the above residual functional capacity assessment is supported by the  
mild objective findings of record, which do not support the degree of disability  
that he claims. His medical records support a limitation to light work. As  
17 discussed before, he avoided reporting his work so he could cheat on taxes, and  
his earnings report is not indicative of his work history. The claimant's  
18 inconsistent statements throughout the record, and compliance problems,  
negatively affect his credibility.

19  
20 In particular, he has failed to diet, although some success is apparent when he  
does, and he failed to exercise. Failure to follow recommended dietary  
guidelines militates against a finding of disability. See, Dixon v. Massanari, 270  
21 F.3d 1171, 1179 ([8th] Cir. 2001), Dumas v. Schweicker, 712 F.2d 1545, 1553  
([2d] Cir. 1983). Failure to lose weight as recommended may be taken into  
22 account in assessing whether pain is disabling. Nelson v. Sullivan, 966 F.2d

363, 367 ([8th] Cir. 1992). See, Osenbrock v. Apfel, 240 F.3d 1157, 1161 ([9th] Cir. 2000); Fair v. Bowen, 885 F.2d 597, 604 ([9th] Cir. 1989). Treating source's advice to increase activity militates against credibility of complaints of disability. See, Curry v. Sullivan, 925 F.2d 1127, 1130 ([9th] Cir. 1990). Failure to follow through on recommendations to exercise as a means to ameliorate condition detracts from the credibility of complaints of pain. Fair v. Bowen, supra, at 603; Roth v. Shalala, 45 F.3d 279, 283 ([8th] Cir. 1995).

I find the BMI issue limits the claimant to occasional postural restrictions, including bending; this was largely considered by the DDS in its assessment.

(AR 22-23; internal citations to record omitted.) The ALJ thereafter, as described above, improperly applied the failure-to-follow-prescribed-treatment regulation. (AR 23.) (*See also* AR 39-41 (2007 credibility assessment).)

Plaintiff first argues that the ALJ erroneously found him not credible because he did not lose weight, follow a diet, or exercise enough. He cites the Ninth Circuit's decision in *Orn v. Astrue*, 495 F.3d 625, 638 (9th Cir. 2007), wherein the Court stated that "the failure to follow treatment for obesity tells us little or nothing about a claimant's credibility." Plaintiff maintains that this erroneous reasoning of the ALJ was at the core of the credibility analysis.

Plaintiff also contends that, in addition to the failure to properly evaluate the objective evidence and his obesity, the ALJ unreasonably found his limited activities, such as driving a car and taking a vacation, to show that he could perform full time work in the light exertional range. He maintains that his overall activities were in the sedentary range. *See Vertigan*, 260 F.3d at 1049 ("[T]he mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from her credibility as to her overall disability.") He asserts that, as of age fifty in October 2004, he would be considered disabled if limited to unskilled sedentary work pursuant to the

01 Medical-Vocational Guidelines. 20 C.F.R. Pt. 404, App. 2, Tbl. 1, Rules 201.12, 201.14  
02 (designating disability for individuals limited to sedentary work who are closely approaching  
03 advanced age, with a high school degree or more, does not provide for direct entry to skilled  
04 work, and whose previous work is unskilled or whose skills are not transferable). Plaintiff also  
05 avers that his vacation in 2004 does not suffice as even a scintilla of evidence that he could  
06 perform, full time, a wide range of light activities from 2004 through the date of the ALJ's  
07 decision in 2008.

08       The Commissioner maintains that the ALJ adequately supported his credibility  
09 assessment. He points to the ALJ's reliance on the inconsistency between plaintiff's trip to  
10 California and statements he made as to his limitations at around the same time as that trip, as  
11 well as inconsistencies between his alleged symptoms and activities in general. (AR 22.) The  
12 Commissioner includes reasoning contained in the ALJ's initial decision, including, for  
13 example, the inconsistency between the fact that plaintiff allegedly did not drive and the  
14 references in the record to "significant driving[.]" such as the fact that he had his tires rotated  
15 every three months and his past arrest for driving on a suspended license. (AR 40-41.) He  
16 asserts that the ALJ may "draw inferences logically flowing from the evidence." *Sample v.*  
17 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (cited sources omitted). Finally, the  
18 Commissioner points to the ALJ's reliance on evidence shedding doubt on plaintiff's reputation  
19 for truthfulness, such as his failure to report his work to avoid paying taxes (AR 22, 40-41), and,  
20 as the ALJ noted in the initial decision, the discrepancy between his testimony that he smoked  
21 three to four cigarettes a week and his failure to report this fact to his treating physician (AR  
22 39). The Commissioner maintains that the multiple bases for finding plaintiff not credible,

01 including the evidence from health care providers undermining plaintiff's allegations, deflate  
02 the contention that the core basis for the adverse credibility finding was plaintiff's inability to  
03 lose weight, diet, or exercise sufficiently.

04 In rendering his decision, the ALJ cited a number of cases supporting his reliance on  
05 plaintiff's failure to follow recommendations to diet, lose weight, and increase activity/  
06 exercise. (AR 23.) However, neither the ALJ, nor the Commissioner, addressed *Orn*, the  
07 more recent Ninth Circuit decision on this subject. In that case, the Ninth Circuit distinguished  
08 the applicability of its prior rulings on the issue of following prescribed treatment in cases  
09 involving obesity:

10 Our case law is clear that if a claimant complains about disabling pain but fails  
11 to seek treatment, or fails to follow prescribed treatment, for the pain, an ALJ  
12 may use such failure as a basis for finding the complaint unjustified or  
13 exaggerated. *See, e.g., [Fair v. Bowen, 885 F.2d 597, 603 (9th Cir. 1989)]*. In the  
14 case of a complaint of pain, such failure may be probative of credibility, because  
15 a person's normal reaction is to seek relief from pain, and because modern  
16 medicine is often successful in providing some relief. But in the case of  
17 impairments where the stimulus to seek relief is less pronounced, and where  
18 medical treatment is very unlikely to be successful, the approach to credibility  
makes little sense. This second case is probably best exemplified by a claimant  
whose obesity adversely affects his or her health and activities. *See S.S.R. 02-1p*  
at 9 (defining "prescribed treatment" narrowly and stating that failure to follow  
treatment for obesity will "rarely" affect disability determinations). **Thus, the  
failure to follow treatment for obesity tells us little or nothing about a  
claimant's credibility.** In the case before us, there is no reason to conclude from  
Orn's failure to adhere to an 1800 calorie-per-day diet that he is not telling the  
truth about his medical problems that are exacerbated by his obesity.

19 *Orn*, 495 F.3d at 638 (emphasis added). *See also Hostrawser v. Astrue*, No. 08-17474, 2010  
20 U.S. App. LEXIS 2594 at \*9 (9th Cir. Feb. 5, 2010) (applying *Orn* and finding ALJ erred in  
21 finding claimant "not credible due to his failure to lose weight despite his doctors'  
22 recommendations.")

01 As argued by plaintiff, the ALJ in this case focused significantly on plaintiff's failures  
02 in regard to dieting, losing weight, and exercising. Indeed, he prefaced his discussion of the  
03 issue with the phrase "[i]n particular[.]" (AR 22-23.) Given *Orn*, this emphasis is  
04 problematic. The ALJ also, as stated above, improperly applied the failure-to-follow-  
05 prescribed-treatment regulation.

06 Nonetheless, the Court is not convinced that plaintiff demonstrates reversible error in  
07 the ALJ's credibility assessment. A single trip, standing alone, is not compelling evidence to  
08 counter a claimant's assertions as to his limitations. *See, e.g., Tackett v. Apfel*, 180 F.3d 1094,  
09 1103 (9th Cir. 1999) (road trip to California not sufficient to counter physicians' opinions that  
10 claimant needed to shift positions every thirty minutes or so, where there was an absence of  
11 information as to his positioning in the car and the frequency and duration of rest stops).  
12 However, the ALJ discussed not only the fact of and activities during plaintiff's trip to  
13 California, but the fact that the trip took place coextensive with plaintiff's recounting of "very  
14 limited daily activities, including difficulty with personal care and limited walking, standing,  
15 lifting, sitting, and even reclining." (AR 22.) The ALJ also, as observed by the  
16 Commissioner, gave a number of other reasons for doubting the credibility of plaintiff's  
17 assertions, including conflicts with the medical record and plaintiff's activities, and instances  
18 shedding doubt on his truthfulness. Additionally, although not discussed in the credibility  
19 assessment, the ALJ had also, at step one, found that while a part-time job was not substantial  
20 gainful activity, "it suggests that he is able to get out in public and interact in a work  
21 environment." (AR 18.)

22 Because the ALJ offered clear and convincing reasons for his credibility assessment,



01 errors as they relate to plaintiff's failure to follow prescribed treatment may be deemed  
02 harmless. *See Carmickle*, 533 F.3d at 1162-63 (error may be deemed harmless where there  
03 remains the support of substantial evidence through other valid reasons to support the ALJ's  
04 conclusion). However, on remand, the ALJ should reassess plaintiff's credibility both with  
05 respect to the issue of his obesity and the failure to diet, lose weight, and exercise, and as  
06 necessitated by reassessment of the medical opinions, as discussed below.

#### 07 Medical Opinions

08 In general, more weight should be given to the opinion of a treating physician than to a  
09 non-treating physician, and more weight to the opinion of an examining physician than to a  
10 non-examining physician. *Lester*, 81 F.3d at 830. Where not contradicted by another  
11 physician, a treating or examining physician's opinion may be rejected only for "clear and  
12 convincing" reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).  
13 Where contradicted, a treating or examining physician's opinion may not be rejected without  
14 "specific and legitimate reasons' supported by substantial evidence in the record for so doing."  
15 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

16 "The opinion of a nonexamining physician cannot by itself constitute substantial  
17 evidence that justifies the rejection of the opinion of either an examining physician or a treating  
18 physician." *Id.* at 831 (citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990) and  
19 *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984)). However, "the report of a  
20 nonexamining, nontreating physician need not be discounted when it 'is not contradicted by *all*  
21 *other evidence* in the record.'" *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (quoting  
22 *Magallanes*, 881 F.2d at 752 (emphasis in original)).

01 The ALJ may reject physicians' opinions "by setting out a detailed and thorough  
02 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
03 making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes*,  
04 881 F.2d at 751). Rather than merely stating his conclusions, the ALJ "must set forth his own  
05 interpretations and explain why they, rather than the doctors', are correct." *Id.* (citing  
06 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

07 Plaintiff argues that the ALJ erroneously rejected the opinions of treating physician Dr.  
08 Eggertsen limiting him to sedentary work. (AR 221, 288, 312-15, 386, 388.) Again, he  
09 asserts that, as of the date he turned fifty in October 2004, this restriction to sedentary work  
10 leads to a conclusion of disability. 20 C.F.R. Pt. 404, App. 2, Tbl. 1, Rules 201.12, 201.14.

11 The ALJ addressed the opinions of Dr. Eggertsen as follows:

12 With respect to the issue of obesity, at the prior hearing, claimant said that he  
13 was 5'11 and 350 pounds. His treating doctor, Sam Eggertsen, M.D., has told  
14 him to lose weight. It does not appear that claimant followed up on these  
15 constant recommendations, but Dr. Eggertsen never mentioned specific  
16 functional observations relevant to the claimant's obesity, and has never really  
17 discussed it, even when describing particular examination findings. In April  
18 2005, the claimant said he was trying to work on exercise and weight loss. His  
19 weight was down to 326 from 334. Even though he claimed to be exercising,  
20 by August 22, 2005, his weight was back up to 334. Dr. Eggertsen strongly  
21 recommended diet and aerobic activity.

22 By January 2006, the claimant's weight was down to 322. His back pain was  
doing well with Vicodin. It has gone up since then, however.

In November 2006, Dr. Eggertsen assessed the claimant with a capacity for  
sedentary work with periodic alternating between sitting and standing.  
Claimant could do limited pushing and pulling and had postural and  
manipulative limitations. This discussion was based on consideration of the  
claimant's obesity and his other impairments. This was a check-box form  
without narrative support, and it is inconsistent with Dr. Eggertsen's treatment  
notes and the objective findings of record. Dr. Eggertsen's opinion was based

01 on the claimant's subjective complaints, apparently, and is not given great  
 02 weight. Overall, in his treatment notes Dr. Eggertsen mentioned obesity but  
 03 did not direct much attention to it other than advising the claimant to exercise  
 04 more, and lose weight.

05 Later reports are also considered: the claimant continued to see Dr. Eggertsen  
 06 for routine follow-up and medication management. The claimant was not  
 07 compliant with diet and gained weight, staying over 300 pounds. He  
 08 complained of radiating back pain, without radiation, and exacerbated by  
 09 bending and lifting; he also reported that his pain was improved by exercise.  
 10 That inconsistency was unexplained. In April 2007 Dr. Eggertsen stated that  
 11 the claimant had bilaterally positive straight leg raise at 45 degrees. That  
 12 would suggest a degree of back pain, but these findings are not described  
 13 elsewhere in the record, and Dr. Eggertsen generally found the claimant in no  
 14 distress.

15 In January and February 2008 Dr. Eggertsen again assessed the claimant as  
 16 capable of sedentary work without restrictions. As before, these were  
 17 check-box reports without narrative support. They are not consistent with his  
 18 office notes showing that the claimant had mild pain and should perform aerobic  
 19 exercise as part of his treatment regimen. All in all, these reports are very  
 20 subjective. Just as with the earlier assessment, the claimant's symptoms were  
 21 subjective without evidence to support them. These reports are given scant  
 22 weight with respect to the limitations indicated.

14 (AR 21; internal citations to record omitted.) The ALJ then assessed the opinions of a  
 15 non-examining physician, Dr. Jeffrey Merrill, on a Physical RFC Assessment form (PRFCA):

16 A DDS reviewing source concluded that claimant could do light exertional work  
 17 with occasional climbing, balancing, stooping, kneeling, crouching, and  
 18 crawling. That assessment is consistent with the effects of the claimant's  
 19 impairments, including obesity. Although the state agency doctor did not  
 20 examine the claimant, his opinion is more consistent with claimant's activities  
 21 and objective findings. This assessment is given very great weight.

20 (AR 22; internal citation to AR 178-83 omitted.)<sup>2</sup>

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22 <sup>2</sup> The ALJ also gave "great weight" to the opinions of a reviewing psychologist who found mild  
 and moderate limitations, and opined that claimant "could manage simple and complex tasks, and would

01 Plaintiff avers that the ALJ's failure to expressly cite either regulatory or Ninth Circuit  
02 law as to the framework for assessing a treating physician's opinions is non-conclusive  
03 evidence that the ALJ did not use that framework. *See* 20 C.F.R. § 416.927 (Evaluating  
04 opinion evidence). He takes issue with the ALJ's reliance on the allegedly "mild" findings and  
05 the recommendations to diet, lose weight, and exercise, for the reasons discussed above.  
06 Plaintiff also challenges the apparent rejection of Dr. Eggertsen's opinions on the ground that  
07 that physician did not address functional limitations in his clinical notes. He asserts that a busy  
08 physician offers such opinions not in clinical notes as a routine matter, but when asked for such  
09 opinions, as Dr. Eggertsen did here.

10 Plaintiff notes that Dr. Eggertsen's opinions were not controverted by the opinion of a  
11 treating or examining physician. Instead, the ALJ gave "very great weight" to opinions  
12 contained on the PRFCA signed by a non-examining physician, Dr. Merrill. Plaintiff stresses  
13 that the form was prepared by a non-physician adjudicator and only later affirmed by Dr.  
14 Merrill, a fact not acknowledged by the ALJ. He asserts error in the assignment of greater  
15 weight to the check-box PRFCA, containing explanatory comments only from the  
16 non-physician adjudicator. *See* SSR 96-8p ("[T]he opinions of physicians or psychologists  
17 who do not have a treatment relationship with the individual are weighed by stricter standards,  
18 based to a greater degree on medical evidence, qualifications, and explanations for the opinions,  
19 than are required of treating sources.") Plaintiff argues that the Court should hold him clearly  
20 disabled at step five, either since his SSI application month of June 2004 based on his inability

21  
22 function[] best in a job with limited public contact and routine supervision." (AR 22; internal citation omitted.)

01 to work full time, *see* SSR 96-8p, or since his fiftieth birthday in October 2004 due to Dr.  
02 Eggertsen's opinions finding him limited to sedentary work, *see* 20 C.F.R. Pt. 404, App. 2, Tbl.  
03 1, Rules 201.12, 201.14.

04 The fact that the ALJ did not recite the legal framework for the relative weight to afford  
05 physicians' opinions is not, in and of itself, troubling. However, consideration of that  
06 framework in relation to the ALJ's decision in this case reveals reversible error.

07 SSR 96-6p addresses the proper treatment of opinions of reviewing State agency  
08 consultants and other program physicians and psychologists. It does not discuss  
09 non-physician adjudicators. Nor does it reflect that a State agency physician affirming the  
10 assessment of a non-physician adjudicator must provide independent analysis. Instead, SSR  
11 96-6p indicates that a State agency physician's explanation for his or her opinion is one of  
12 several different factors to consider in determining the weight to accord that opinion. As such,  
13 as argued by the Commissioner, the ALJ did not err in giving weight to the opinions of Dr.  
14 Merrill, who, in signing the form, indicated he had reviewed the evidence in the file and  
15 affirmed the opinions in the PRFCA as written. (AR 183.)

16 However, as argued by plaintiff, it is questionable whether substantial evidence  
17 supports the ALJ's decision to give greater weight to the opinions of Dr. Merrill over those of  
18 Dr. Eggertsen. An ALJ permissibly rejects opinions rendered on check-off reports lacking any  
19 explanation for the conclusions reached. *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1995).  
20 Here, the ALJ criticized the opinions of Dr. Eggertsen, in part, based on their inclusion in  
21 check-box forms, without narrative support. (AR 21.) Yet, he rendered no such criticism of  
22 the check-box form signed by Dr. Merrill. (AR 22.) While the PRFCA did contain one

01 explanatory paragraph (AR 180), the information contained within that paragraph did not  
02 significantly, if at all, exceed that contained on Dr. Eggertsen's various forms (*see* AR 220,  
03 287, 313-14, 388). Nor did the ALJ provide any explanation as to how Dr. Eggertsen's  
04 opinions were inconsistent with his treatment notes and the objective findings, or how Dr.  
05 Merrill's were consistent with plaintiff's activities and the objective findings. (AR 21-22.)  
06 Also, as discussed above, plaintiff legitimately criticizes the ALJ's focus on plaintiff's failures  
07 in relation to his obesity and, to some extent, the ALJ's reflections as they relate to the objective  
08 findings in the record.

09 Plaintiff's argument as it relates to Dr. Eggertsen's failure to mention specific  
10 functional observations relevant to plaintiff's obesity is not entirely persuasive. While  
11 criticizing the failure to mention such observations, the ALJ later stated that Dr. Eggertsen  
12 based his November 2006 opinions, which included specific assessed limitations, "on  
13 consideration of plaintiff's obesity and his other impairments." (AR 21.) Interestingly, the  
14 November 2006 form included references to back and shoulder pain, but did not actually  
15 mention plaintiff's obesity. (AR 312-15.) At the same time, as argued by plaintiff, a treating  
16 physician would be more likely to address specific functional limitations in forms seeking such  
17 information, rather than in treatment records. However, the lack of any mention in the  
18 treatment records could be significant as evidence that plaintiff never mentioned any limitations  
19 due to his weight as part of his complaints or as part of his medical history.

20 The Court also notes that, although not discussed in the ALJ's second decision or  
21 brought up by the parties in their arguments, the record contained an additional opinion from an  
22 examining or treating physician, Dr. Chin, limiting plaintiff to sedentary work. (AR 202-03.)

01 While the ALJ's decision to afford Dr. Chin's opinion little weight may well withstand  
02 scrutiny, the existence of a second opinion from an examining or treating physician further  
03 detracts from the ALJ's decision to rely on the single opinion of a non-examining physician.  
04 *See, e.g., Lester*, 81 F.3d at 831 ("The opinion of a nonexamining physician cannot by itself  
05 constitute substantial evidence that justifies the rejection of the opinion of either an examining  
06 physician or a treating physician.") (cited sources omitted).

07       Given the above-described deficiencies in the ALJ's rejection of Dr. Eggertsen's  
08 opinions, those opinions could be credited as true. *See Lester*, 81 F.3d at 830-34 ("Where the  
09 Commissioner fails to provide adequate reasons for rejecting the opinion of a treating or  
10 examining physician, [the Court credits] that opinion as 'a matter of law.'"; finding that, if  
11 doctors' opinions and plaintiff's testimony were credited as true, plaintiff's condition met a  
12 listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989)). Crediting an opinion  
13 as a matter of law is appropriate when, taking that opinion as true, the evidence supports a  
14 finding of disability. *See, e.g., Schneider v. Commissioner of Social Sec. Admin.*, 223 F.3d  
15 968, 976 (9th Cir. 2000) ("When the lay evidence that the ALJ rejected is given the effect  
16 required by the federal regulations, it becomes clear that the severity of [plaintiff's] functional  
17 limitations is sufficient to meet or equal [a listing.]"); *Smolen v. Chater*, 80 F.3d 1273, 1292  
18 (9th Cir. 1996) (ALJ's reasoning for rejecting subjective symptom testimony, physicians'  
19 opinions, and lay testimony legally insufficient; finding record fully developed and disability  
20 finding clearly required). In this case, for the reasons described below, plaintiff fails to  
21 demonstrate that Dr. Eggertsen's opinions should be credited as true.

22       The Commissioner observes several legitimate reasons for the ALJ's assessment of Dr.

01 Eggertsen's opinions. The reports completed by Dr. Eggertsen were in check-box format,  
02 arguably unsupported by the treatment notes, and arguably, at least in part, reliant on plaintiff's  
03 subjective complaints,<sup>3</sup> which the ALJ found not credible. *See, e.g., Batson v. Commissioner*,  
04 359 F.3d 1190, 1195 (9th Cir. 2004) (a treating physician's opinions may be discounted when it  
05 is "in the form of a checklist, did not have supportive objective evidence, was contradicted by  
06 other statements and assessments of [the claimant's condition], and was based on [the  
07 claimant's] subjective descriptions of pain[.]" as well as when that opinion is "conclusory,  
08 brief, and unsupported by the record as a whole . . . or by objective medical findings[.]") and  
09 *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) ("An ALJ may reject a treating  
10 physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been  
11 properly discounted as incredible.") (quoted and cited sources omitted). The ALJ also noted  
12 the reflection in Dr. Eggertsen's notes that plaintiff's pain was improved with medication and  
13 exercise. (AR 21.) (*See, e.g.*, AR 308 (May 2005 treatment note from Dr. Eggertsen stating:  
14 "50-year-old with chronic back pain, stable on current medication along with exercise and  
15 hypertriglyceridemia, on Niacin and Gemfibrozil."); AR 340 (April 2007 treatment note from  
16 Dr. Eggertsen stating: "A 52-year-old with mild thoracic outlet syndrome symptoms, chronic  
17 pain, hypertension, under good control, hyperlipidemia, under good control, and mild  
18 diabetes.")) Given the legitimate aspects of the ALJ's reasoning, and based on review of the  
19 record as a whole, the Court concludes that crediting Dr. Eggertsen's opinions as true and  
20 awarding benefits would not be appropriate in this case. *See, e.g., Connett v. Barnhart*, 340  
21 F.3d 871, 876 (9th Cir. 2003) (reflecting that courts retain flexibility in applying the "crediting

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22 <sup>3</sup> Dr. Eggertson did, in his November 2006 report, recite the MRI findings. (AR 313.)



01 as true' theory."'; remanding for further determinations where there were insufficient findings  
02 as to whether plaintiff's testimony should be credited as true); *Barbato v. Commissioner of Soc.*  
03 *Sec. Admin.*, 923 F. Supp. 1273, 1278 (C.D. Cal. 1996) ("In some cases, automatic reversal  
04 would bestow a benefits windfall upon an undeserving, able claimant."'; remanding for further  
05 proceedings where the ALJ made a good faith error, in that some of his stated reasons for  
06 rejecting a physician's opinion were legally insufficient).

07       Instead, the Court concludes that the ALJ in this case should have contacted Dr.  
08 Eggertsen for further information. An ALJ has an obligation to recontact a treating physician  
09 or psychologist when the evidence received is inadequate for a determination of disability. 20  
10 C.F.R. §§ 404.1512(e), 416.912(e). *See also Widmark v. Barnhart*, 454 F.3d 1063, 1068 (9th  
11 Cir. 2006) ("[T]he ALJ should not be 'a mere umpire' during disability proceedings. Rather, the  
12 ALJ has 'a special duty to fully and fairly develop the record and to assure that the claimant's  
13 interests are considered.'") (quoted sources omitted). The "ALJ's duty to develop the record  
14 further is triggered only when there is ambiguous evidence or when the record is inadequate to  
15 allow for proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th  
16 Cir. 2001). *See also Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) ("Ambiguous  
17 evidence, or the ALJ's own finding that the record is inadequate to allow for proper evaluation  
18 of the evidence, triggers the ALJ's duty to 'conduct an appropriate inquiry.'") (quoted source  
19 omitted). The applicable regulations note that additional evidence or clarification is sought  
20 when a medical source's report "contains a conflict or ambiguity that must be resolved, . . . does  
21 not contain all the necessary information, or does not appear to be based on medically  
22 acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. §§ 404.1512(e)(1),

01 416.912(e)(1).

02       The Commissioner would presumably argue that there was no duty to recontact where  
03 Dr. Eggertsen's opinions were not supported by the clinical evidence and based on the  
04 claimant's subjective complaints, and where the ALJ found the record adequate to make a  
05 determination as to disability. *See, e.g., Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir.  
06 1995). However, the Court finds that the disparity between the findings in the treatment notes  
07 and the conclusions reached on the check-box forms presents an unresolved ambiguity.  
08 Additionally, the Commissioner repeatedly points to a perceived inconsistency by the ALJ in  
09 that Dr. Eggertsen simultaneously assessed plaintiff as limited to sedentary work while  
10 recommending that he undertake aerobic activity. (AR 21, 222, 289, 387, 389.) This is not  
11 necessarily an inconsistency. That is, it would seem reasonable for a physician to find an  
12 individual in his present state restricted to sedentary work due to obesity and back pain, but  
13 nonetheless recommend aerobic activity as a means of treating the restricting conditions.  
14 Nonetheless, the ALJ was clearly troubled by this perceived inconsistency. Also, the record in  
15 this case as a whole contains notably minimal opinion evidence.

16       The Court also takes note of the fact that Dr. Eggertsen, in November 2006, found  
17 plaintiff capable of a slightly greater capacity of work than on other occasions in finding  
18 plaintiff capable of lifting up to ten pounds both occasionally and frequently, and of standing  
19 and/or walking at least two hours in an eight-hour workday. (AR 312.) Dr. Eggertsen had on  
20 other occasions found plaintiff limited to occasional lifting of up to ten pounds and frequent  
21 lifting of either up to five pounds or "such articles as files and small tools[.]" and to work which  
22 "may require sitting, walking and standing for brief periods." (AR 221, 288, 312, 386, 388.)

01 This disparity raises a possible question as to whether, based on Dr. Eggertsen's opinions as to  
02 sedentary work, plaintiff could be deemed disabled as of his fiftieth birthday pursuant to the  
03 Medical-Vocational Guidelines. *See* 20 C.F.R. Pt. 404, App. 2, Tbl. 1, Rules 201.12, 201.14  
04 (designating disability for individuals limited to sedentary work) and 20 C.F.R. §§ 404.1567(a),  
05 416.967(a) ("Sedentary work involves lifting no more than 10 pounds at a time and  
06 occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a  
07 sedentary job is defined as one which involves sitting, a certain amount of walking and standing  
08 is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are  
09 required occasionally and other sedentary criteria are met.") *See also infra* at 27-28  
10 (discussing an additional issue precluding a finding of disability based on the  
11 Medical-Vocational Guidelines).

12 In sum, the Court recommends that this matter be remanded for further administrative  
13 proceedings. The ALJ should contact Dr. Eggertsen for further explanation of the bases for his  
14 opinions finding plaintiff limited to sedentary work and to explain the discrepancy between his  
15 findings in November 2006 and on other occasions. The ALJ should also call a medical expert  
16 to obtain an additional medical opinion.

#### 17 Remand

18 As stated above, this case should be remanded for further administrative proceedings.  
19 The Court separately addresses below other arguments offered in favor of remand for an award  
20 of benefits.

21 Plaintiff argues that, based on the opinions finding him limited to sedentary work, he  
22 could be deemed disabled as of his fiftieth birthday in October 2004 pursuant to the

01 Medical-Vocational Guidelines. 20 C.F.R. Pt. 404, App. 2, Tbl. 1, Rules 201.12, 201.14.  
02 However, in order to be deemed disabled as a matter of law under those rules, a claimant would  
03 have to have unskilled past relevant work experience or no transferable skills. *Id.* Plaintiff's  
04 past relevant work included unskilled work as a kitchen helper and semi-skilled work as a  
05 forklift operator. (*See* AR 450 and SSR 00-4p.) Plaintiff concedes that the ALJ did not  
06 determine the issue of transferable skills. He maintains that he could not reasonably be found  
07 to have transferable skills to sedentary work from such low-semi-skilled work. He  
08 alternatively argues that, if the Court does not agree he did not have transferable skills, it should  
09 remand for a determination as to whether he has transferable skills from his work as a forklift  
10 operator to semi-skilled sedentary work.

11 Because the ALJ did not address the issue, it would not be appropriate for the Court to  
12 render a decision as to transferable skills. At the very least, therefore, this matter requires  
13 remand as to this issue.

14 Plaintiff also argues generally that he could be deemed clearly disabled at step five  
15 based on his inability to work full time. *See* SSR 96-8p (defining RFC as ability to work on a  
16 "regular and continuing basis[.]" meaning "8 hours a day, for 5 days a week, or an equivalent  
17 work schedule.") However, he does not point to any medical opinions, from Dr. Eggertsen or  
18 otherwise, supporting an assertion as to his inability to work full time. Dr. Eggersten  
19 repeatedly assessed plaintiff as able to work at the sedentary level and "able to participate in  
20 pre-employment activities such as job search or employment classes[.]" (AR 221-22, 288-89,  
21 386.) Dr. Eggertsen did, in a March 2008 documentation request form, opine that plaintiff was  
22 limited to working "11-20" hours per week due to his back pain. (AR 388.) However, he had

01 not so opined on a like form completed two months prior (AR 386), or indicated any similar  
02 opinion in the preceding years. Moreover, to the extent plaintiff relies on his own assertion of  
03 an inability to work full time, the ALJ offered sufficient reasons for doubting plaintiff's  
04 credibility. As such, plaintiff fails to adequately support his assertion that he could be deemed  
05 clearly disabled based on an inability to work full time.

06 **CONCLUSION**

07 For the reasons set forth above, this matter should be REMANDED for further  
08 administrative proceedings. A proposed order accompanies this Report and Recommendation.

09 DATED this 16th day of June, 2010.

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12 Mary Alice Theiler  
13 United States Magistrate Judge  
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